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10 UNITED STATES DISTRICT COURT

11 NORTHERN DISTRICT OF CALIFORNIA

12 SAN FRANCISCO DIVISION

13 WAYMO LLC,

14 Plaintiff,

15 vs.

16 UBER TECHNOLOGIES, INC.;
17 OTTOMOTTO LLC; OTTO TRUCKING LLC,

18 Defendants.

CASE NO. 3:17-cv-00939

**PLAINTIFF WAYMO LLC'S RESPONSE
TO OTTO TRUCKING'S MOTION FOR
RELIEF FROM AND EMERGENCY
MOTION TO STAY OF NON-
DISPOSITIVE PRETRIAL ORDER OF
MAGISTRATE JUDGE (DKT. 881)**

Judge: The Honorable William Alsup

Trial Date: October 10, 2017

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25 REDACTED VERSION OF DOCUMENT(S) SOUGHT TO BE SEALED
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1 Otto Trucking does not dispute that each of its four corporate officers use personal email
 2 accounts to conduct Otto Trucking business, and does not dispute that these emails are responsive
 3 to Waymo's document requests. (*See* Dkt. 681-4, 2 n.1.) Otto Trucking objects to producing
 4 these documents on the lone ground that it "does not have control" over its officers' emails. (Dkt.
 5 927-4 ("Br."), 6.) But Otto Trucking does have control over its officers, both because [REDACTED]
 6 [REDACTED]. Further, as
 7 Judge Corley noted, to side with Otto Trucking would be to allow a corporation to insulate all of
 8 its corporate correspondence from discovery merely by conducting such correspondence with
 9 personal emails. The Court should order production by Otto Trucking.

10 Under FRCP 72, a district judge considering timely objections to a magistrate judge's
 11 nondispositive order must defer to the order unless it is "clearly erroneous or contrary to law."
 12 *Grimes v. City & Cty. of San Francisco*, 951 F.2d 236, 241 (9th Cir. 1991). As Otto Trucking
 13 concedes, the determination of "control" in the context of a party's ability to obtain documents
 14 from its officers is "fact specific." Br. 4. The Court must review Judge Corley's factual findings
 15 for clear error. *Quinn v. Robinson*, 783 F.2d 776, 791 (9th Cir.1986).

16 This district has previously recognized that "[n]umerous courts have found that
 17 corporations have control over their officers and employees and that corporations may be required
 18 to produce documents in their possession." *Miniace v. Pac. Maritime Ass'n*, No. C 04-03506 SI,
 19 2006 WL 335389, at *2 (N.D. Cal. Feb. 13, 2006). The determination hinges on factors such as
 20 fiduciary duty and the power to terminate, the latter of which "easily satisfies the standard for
 21 control." *Id.*

22 Otto Trucking does not dispute that termination power suffices for control. Br. 4. [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]
 26 [REDACTED]
 27 [REDACTED]
 28 [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 “Control” for document-production purposes may also be established by fiduciary duty. In
 4 *Riddell Sports Inc. v. Brooks*, 158 F.R.D. 555, 558 (S.D.N.Y. 1994), the United States District
 5 Court for the Southern District of New York squarely held that as to documents “created in
 6 connection with the officer’s functions as a corporate employee, the corporation has a proprietary
 7 interest in them and the officer has a fiduciary duty to turn them over on demand.” *Id.* at 559; *see*
 8 *also Miniace*, 2006 WL 335389, at *2 (citing *Riddell* approvingly).

9 Otto Trucking cites only two cases in arguing that a company may not compel production
 10 of personal emails (Br. 2-3), but neither controvert *Riddell* because, as Judge Corley noted, neither
 11 involved corporate officers. (Dkt. 881, 3; *see Matthew Enter., Inc. v. Chrysler Grp. LLC*, No. 13-
 12 CV-04236-BLF, 2015 WL 8482256, at *3-*4 (N.D. Cal. Dec. 10, 2015) (car dealership lacks
 13 control over non-officer employees); *Ubiquiti Networks, Inc. v. Kozumi USA Corp.*, No. 12-CV-
 14 2582 CW JSC, 2013 WL 1767960, at *2-3 (N.D. Cal. Apr. 15, 2013) (no control over non-officer
 15 Taiwan-based consultant).). Indeed, Otto Trucking does not dispute the legal tenet that an
 16 officer’s fiduciary duty to a company requires the officer to turn documents over to that company,
 17 nor that the personal emails at issue here were created in connection with corporate functions. In
 18 fact, Otto Trucking confirms that because Otto Trucking has no email servers, the *only* emails
 19 concerning company business are those in its officers’ personal email accounts. (Dkt. 928, 2.).

20 Instead, Otto Trucking argues that its [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

26
 27 1 [REDACTED]
 28 [REDACTED]

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]

8 Finally, even absent a fiduciary duty, Otto Trucking could not escape its obligation to
 9 provide discovery into company affairs merely by conducting its affairs exclusively through
 10 personal emails. As Judge Corley noted, it would be “remarkable” to allow a party to evade its
 11 discovery obligations merely by using personal emails, and Otto Trucking has not presented any
 12 case endorsing that proposition. (Dkt. 881, 3.) Thus, because Mr. Levandowski, Mr. Ron, Mr.
 13 Bentley, and Ms. Morgan are all under the control of party Otto Trucking and because they may
 14 not evade discovery merely by conducting business using personal email, discovery into Otto
 15 Trucking’s business affairs is properly sought through Rule 34, and not Rule 45, as Otto Trucking
 16 suggests.

17 For the foregoing reasons, the Court should deny Defendant Otto Trucking’s Motion for
 18 Relief From and Emergency Motion for Stay of Non-Dispositive Pretrial Order of Magistrate
 19 Judge.

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 21 DATED: July 21, 2017

QUINN EMANUEL URQUHART & SULLIVAN, LLP

22 By /s/ Charles K. Verhoeven

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 24 Attorneys for WAYMO LLC
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